Supreme Court, U.S.
FILED
DEC 2 . 2005
OFFICE OF THE CLERK

Nos. 04-1034 and 04-1384

In The Supreme Court of the United States

JOHN A. RAPANOS, *et ux., et al., Petitioners,*

v.

UNITED STATES

JUNE CARABELL, *et al., Petitioners,*

v.

UNITED STATES ARMY CORPS OF ENGINEERS

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN PETROLEUM INSTITUTE SUGGESTING REVERSAL IN NOS. 04-1034 AND 04-1384

HARRY M. NG
RALPH J. COLLELI JR.
ERIK G. MILITO
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
(202) 682-8000

THOMAS SAYRE LLEWELLYN
(COUNSEL OF RECORD)
5125 MacArthur Blvd., NW
Suite 32-A
Washington, DC 20016
(202) 237-7291

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....ii

INTEREST OF THE *AMICUS CURIAE*.....1

SUMMARY OF THE ARGUMENT.....2

ARGUMENT.....4

CONGRESS LIMITED "NAVIGABLE WATERS" TO TRADITIONAL NAVIGABLE WATERS (AND ABUTTING WETLANDS); DEVISED THE "DISCHARGE" MECHANISM TO PROTECT "NAVIGABLE WATERS" FROM UPSTREAM POLLUTION; AND ALLOWED STATES TO PROTECT STATE WATERS.....4

I. The Importance Of Section 311 To Construction Of The Clean Water Act.....4

II. Congress' Objectives In The 1972 Amendments.....8

III. Where The Sixth Circuit Errs.....18

IV. Implications Of The Sixth Circuit's Holdings.....21

CONCLUSION.....23

TABLE OF AUTHORITIES

Cases

Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361 (1986).....19

Economy Power & Light Co. v. United States, 256 U.S. 113 (1921).....12

McDermott v. Wilander, 498 U.S. 337 (1991).....5

NLRB v. Amax Coal Co., 453 U.S. 322 (1981).....5

Northern Cal. River Watch v. City of Healdsburg, 2004 U.S. Dist. LEXIS 1008 (N.D. Cal. Jan. 23, 2004).....9

Rodriguez v. United States, 480 U.S. 522 (1987).....19

Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs, 531 U.S. 159 (2001).....*passim*

South Fla. Water Mgt. Dist. v. Miccosukee Tribe, 541 U.S. 95 (2004).....17

The Daniel Ball, 6 F. Cas. 1161 (W.D. Mich.), *rev'd*, 77 U.S. (10 Wall.) 557 (1871).....10, 13

United States v. Appalachian Elec. Power Co., 311 U.S. 377 (1940).....12

United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974).....8

United States v. Deaton, 332 F.3d 698 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004).....20

United States v. Earth Sciences, Inc., 599 F.2d 368 (10th Cir. 1979).....19

United States v. Gerke Excavating Inc., 412 F.3d 804 (7th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3309 (U.S. Nov. 11, 2005) (No. 05-623).....20

United States v. Holland, 373 F. Supp. 665 (M.D. Fla. 1974).....5

United States v. Rapanos, 376 F.3d 629 (6th Cir. 2004).....18, 20, 22

United States v. Riverside Bayview Homes, 474 U.S. 121 (1985).....15

United States v. Stoeco Homes, Inc., 498 F.2d 597 (3d Cir. 1974).....5, 9-10

United States v. Texas Pipe Line Co., 611 F.2d 345 (10th Cir. 1979).....8

Ward v. Coleman, 598 F.2d 1187 (10th Cir. 1979), *rev'd*, 448 U.S. 242 (1980).....8

Wyoming v. Hoffman, 437 F. Supp. 114 (D. Wyo. 1977).....8

Statutes

33 U.S.C. § 403 (2000).....9
33 U.S.C. § 1161 (1970).....4
33 U.S.C. § 1161(b)(2) (1970).....4
33 U.S.C. § 1161(b)(4) (1970).....4
33 U.S.C. § 1161(f) (1970).....4
33 U.S.C. § 1161(j)(1)(C) (1970).....4
33 U.S.C. § 1251(b) (2000).....9
33 U.S.C. § 1311 (2000).....8
33 U.S.C. § 1311(a) (2000).....16
33 U.S.C. § 1321 (2000).....2, 4, 6
33 U.S.C. § 1321(a)(2) (2000).....16
33 U.S.C. § 1321(b)(3) (2000).....4, 16
33 U.S.C. § 1321(b)(5) (2000).....4
33 U.S.C. § 1321(b)(6) (2000).....22
33 U.S.C. § 1321(b)(7) (2000).....22
33 U.S.C. § 1321(f) (2000).....4
33 U.S.C. § 1321(j)(1)(C) (2000).....4
33 U.S.C. § 1342 (2000).....7, 8
33 U.S.C. § 1344 (2000).....7, 8
33 U.S.C. § 1362(7) (2000).....7, 9
33 U.S.C. § 1362(12) (2000).....8, 16
33 U.S.C. § 1362(14) (2000).....16

Session Laws

Clean Water Act of 1977, Pub. L. No. 95-217,
91 Stat. 1566 (1977).....15

Federal Water Pollution Control Act, ch. 758,
62 Stat. 1155 (1948).....4

Federal Water Pollution Control Act
Amendments of 1972, Pub. L.
No. 92-500, 86 Stat. 816 (1972).....6, 8, 9

Water Quality Act of 1965, Pub. L. No. 89-234, 79 Stat. 903 (1965).....10

Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970).....4

Legislative History

116 Cong. Rec. 8985 (March 24, 1970).....6, 11

Congressional Research Service, Legislative History of the Water Pollution Control Act Amendments of 1972 (1973).....7, 11, 13

H.R. Rep. No. 917, 91st Cong., 2d Sess. (1970).....12

H.R. Rep. No. 1323, 92d Cong., 2d Sess. (1972).....12, 13, 14

S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. (1972).....7

Regulations

33 C.F.R. § 209.150.....12
33 C.F.R. § 328.3(a) (2005).....7
40 C.F.R. Part 112 (2005).....2
40 C.F.R. § 112.2 (2005).....7
40 C.F.R. § 122.2 (2005).....7

Federal Register Notices

35 Fed. Reg. 8280 (May 27, 1970).....12
67 Fed. Reg. 47042 (July 17, 2002).....2

Agency Opinions

EPA General Counsel Opinion (Dec. 9, 1971).....6, 14

Legal Treatises And Periodicals

Albrecht and Nickelsburg, *Could SWANCC Be Right? A New Look At The Legislative History Of The Clean Water Act*, 32 Envtl. L. Rep. 11042 (2002).....11

S. Novick (ed.), Law Of Environmental Protection (2004).....17

D. Selmi & K. Manaster, State Environmental Law (2003).....18

Dictionaries

Black's Law Dictionary (4th ed. rev. 1968).....5, 10

Webster's Ninth New Collegiate Dictionary (1988).....16

The American Petroleum Institute ("API") respectfully submits this brief *amicus curiae*, suggesting reversal in both of these consolidated cases. All petitioners and the respondent have granted consent to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

API is a non-profit, nationwide trade association representing more than 400 member companies engaged in all aspects of the petroleum and natural gas industry.[1] API regularly represents the petroleum and natural gas industry in administrative rulemaking proceedings in the various state and federal agencies, and in litigation in state and federal courts.

The industry operates tens of thousands of oil and gas production wells and thousands of pipeline facilities (*e.g.*, pump stations, terminals, and breakout tanks), many of which are located great distances from any "navigable waters" in the traditional sense of the term. Under the reasoning of the Sixth Circuit in the cases at bar, such remotely located facilities could nonetheless be subject to regulation under the Clean Water Act ("CWA") if they are located near any land or aquatic area that eventually drains to any "navigable waters." This would be so even in those cases where there is no reasonable likelihood that a release of oil would ever reach "navigable waters."

Also, many petroleum refining facilities and natural gas plants operate storm water retention basins that, while located near "navigable waters" in the traditional sense of the

---

[1] No counsel for any party in these consolidated cases has authored this brief in whole or in part. No entities other than API and its members have made monetary contributions to the preparation and submission of this brief.

term, have no surface hydrological connection with such "navigable waters." Under the Sixth Circuit's ruling in the *Carabell* case that *mere proximity* to a regulated water body renders a given aquatic area itself subject to CWA regulation, storm water retention basins could be subject to regulation, even though they lack any surface hydrological connection to "navigable waters."

Section 311 of the CWA, 33 U.S.C. § 1321 (2000), regulates discharges of oil to the "navigable waters of the United States," and directs the Environmental Protection Agency ("EPA") to promulgate regulations to prevent and remediate such discharges. In July 2002, EPA promulgated revised regulations known as the Spill Prevention Control and Countermeasure or "SPCC" regulations under section 311. 67 Fed. Reg. 47042 (July 17, 2002) (codified at 40 C.F.R. Part 112 (2005)). The SPCC regulations contain a definition of "navigable waters" nearly identical to the one that the Sixth Circuit applied in the present cases. API is currently prosecuting an action for judicial review of that definition in federal district court. *American Petroleum Institute v. Johnson*, No. 02-2247 (D.D.C. filed Nov. 14, 2002).

SUMMARY OF THE ARGUMENT

The Sixth Circuit erred in holding that any hydrological connection with traditional navigable waters renders an area a "navigable water" and in holding that mere proximity to a regulated water renders an area a "navigable water." A review of the language and the full legislative history of the CWA makes clear Congress intended "navigable waters," "waters of the United States," and "navigable waters of the United States" to include only traditional navigable waters and their abutting wetlands.

This does not mean that pollution of non-navigable waters cannot be regulated under the CWA if such pollution results in the addition of pollutants to traditional navigable waters. Congress deliberately employed the "discharge" mechanism to provide for regulation of pollution of traditional navigable waters from upstream sources. But this is quite different from (1) designating as "navigable waters" any and all areas or water bodies that have any hydrological connection with traditional navigable waters or (2) designating as "navigable waters" any water that is merely *near* traditional navigable waters. Moreover, as this Court emphasized in *Solid Waste Agency of N. Cook County v. Army Corps of Eng'rs*, 531 U.S. 159 (2001) ("*SWANCC*"), Congress intended to preserve primary state authority over activities affecting only state waters.

Under the Sixth Circuit's theory in the *Rapanos* case few areas of the United States (including normally dry land areas) would *not* be "navigable waters" subject to pervasive federal regulation, because most areas have a drainage path that *eventually* leads to traditional navigable waters. Worse, under the Sixth Circuit's theory in the *Carabell* case, mere *proximity* to another area that *eventually* drains to traditional navigable waters would render an area a "navigable water" subject to federal regulation. The judgments in both cases are founded on a faulty construction of the CWA and should be reversed.

ARGUMENT

CONGRESS LIMITED "NAVIGABLE WATERS" TO TRADITIONAL NAVIGABLE WATERS (AND ABUTTING WETLANDS); DEVISED THE "DISCHARGE" MECHANISM TO PROTECT "NAVIGABLE WATERS" FROM UPSTREAM POLLUTION; AND ALLOWED STATES TO PROTECT STATE WATERS.

I. The Importance Of Section 311 To Construction Of The Clean Water Act

The Federal Water Pollution Control Act ("FWPCA," now commonly known as the Clean Water Act or "CWA") was originally enacted in 1948, ch. 758, 62 Stat. 1155 (1948), and has been amended many times. Often overlooked in the construction of the scope of the CWA is the history of section 311, 33 U.S.C. § 1321 (2000). Section 311 traces its roots to the Water Quality Improvement Act of 1970, Pub. L. No. 91-224, 84 Stat. 91 (1970). That Act added to FWPCA a new section 11, entitled "Control Of Pollution By Oil" and codified at 33 U.S.C. § 1161 (1970) (current version at 33 U.S.C. § 1321 (2000)).

Section 11 prohibited the discharge of oil in harmful quantities "into or upon the navigable waters of the United States, adjoining shorelines, or into or upon the waters of the contiguous zone." 33 U.S.C. § 1161(b)(2) (1970) (current version at 33 U.S.C. § 1321(b)(3) (2000)). It also required reporting of discharges; established liability for discharges; and directed the President to issue regulations "establishing procedures, methods, and requirements for equipment to prevent discharges." 33 U.S.C. §§ 1161(b)(4), (f), and (j)(1)(C) (1970) (current versions at 33 U.S.C. §§ 1321(b)(5), (f), and (j)(1)(C) (2000)).

Although the term "navigable waters of the United States" was used throughout section 11, the term was not defined by statute. However, the term already had a well-established meaning in federal law, *i.e.*, those waters that are, were, or with reasonable improvements could be, used for navigation in interstate commerce.[2] *See United States v. Stoeco Homes, Inc.*, 498 F.2d 597, 608-611 (3d Cir. 1974); *United States v. Holland*, 373 F. Supp. 665, 669-70 (M.D. Fla. 1974). *See also* Black's Law Dictionary 1179 (4th ed. rev. 1968). Congress must be presumed to have used the term in 1970 in its traditional sense, unless the statute dictates otherwise. *McDermott v. Wilander*, 498 U.S. 337, 342 (1991); *NLRB v. Amax Coal Co.*, 453 U.S. 322, 329 (1981).

The 1970 enactment did not dictate otherwise. In fact, the Senate floor manager's summary of conference action on the 1970 Water Quality Improvement Act confirmed that Congress used the term in its traditional sense:

> One matter of importance throughout the legislation is the meaning of the term "navigable waters of the United States."
>
> The conference agreement does not define the term. Based on the history of consideration of this legislation it is obvious that its provisions and the extent of application should be construed broadly. It is intended that this term include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law

---

[2] API refers to such waters throughout this brief as "traditional navigable waters."

> which are navigable in fact. It is further intended that such waters shall be considered to be navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other states or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases, the commerce on such waters would have a substantial economic effect on interstate commerce.

116 Cong. Rec. 8985 (March 24, 1970).[3] Moreover, in 1971, EPA's General Counsel opined that the term "navigable waters of the United States" was used in its traditional sense in the 1970 Act. *See* EPA General Counsel Opinion (Dec. 9, 1971).

Two years after enactment of section 11, Congress enacted the Federal Water Pollution Control Act Amendments of 1972 (hereafter, "1972 Amendments"). Pub. L. No. 92-500, 86 Stat 816 (1972). The 1972 Amendments carried forward the oil pollution control provisions of section 11, with some amendments not relevant here, and redesignated section 11 as section 311. Pub. L. No. 92-500, § 2, 86 Stat. 862 (1972) (current version at 33 U.S.C. § 1321 (2000)). The Conference Report stated that section 311 was intended to be "basically the same as

---

[3] Senator Muskie later used similar language to describe the CWA section 502(7) definition of "navigable waters" – added by the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (1972) – in his manager's statement on those 1972 Amendments. *See infra* at 11.

existing law," *i.e.*, basically the same as the 1970 enactment. S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 132, 133 (1972), *reprinted in* 1 Congressional Research Service, Legislative History of the Water Pollution Control Act Amendments of 1972 at 315, 316 (1973) (hereafter, "1972 Legislative History"). Under then existing law, the "navigable waters of the United States" meant traditional navigable waters, as shown above.

It is possible, of course, that Congress intended section 311 to have a narrower scope than other provisions of the CWA.[4] However, it is the position of the United States that section 311 has the same scope as sections 404 and 502(7), 33 U.S.C. §§ 1344, 1362(7) (2000) (at issue here), as well as section 402, 33 U.S.C. § 1342 (2000). This is demonstrated by the practically identical language of the several definitions of "navigable waters" or "waters of the United States" in the regulations that purportedly implement those statutory provisions. *Compare* 33 C.F.R. § 328.3(a) (2005) *with* 40 C.F.R. § 112.2 (2005) *and* 40 C.F.R. § 122.2 (2005). If all of those statutory provisions do have the same scope, then the history of section 311 must be considered in defining that scope.

The history of section 311 establishes that its original scope was limited to traditional navigable waters, and that Congress did not intend to enlarge that scope (*i.e.*, did not intend to depart dramatically from "existing law") in the 1972 Amendments. Assuming, *arguendo*, that the scope of section 311 is the same as the scope of the rest of the CWA,

---

[4] In fact, in its pending motion for summary judgment in *API v. Johnson*, No. 02-2247 (D.D.C. filed Nov. 14, 2002), API has argued in the alternative that if other provisions of the CWA are held to reach far beyond traditional navigable waters in their use of the term "navigable waters" or "waters of the United States," then section 311 must have a narrower scope than the rest of the CWA.

any suggestion that Congress intended to go far beyond traditional navigable waters in sections 404 or 502(7) is extremely difficult to reconcile with the history of section 311.[5] In fact, as shown below, the language and legislative history of those other provisions establish a continued focus upon protecting traditional navigable waters (waters subject to the federal servitude), while otherwise preserving state authority to protect state waters.

II. Congress' Objectives In The 1972 Amendments

In addition to carrying forward the oil spill prevention provisions of former section 11 (now section 311), the 1972 Amendments added significant new regulatory programs aimed at protecting water quality. In particular, the 1972 Amendments established the National Pollutant Discharge Elimination System ("NPDES"), which requires a permit from EPA for the discharge of "pollutants" to the "navigable waters;" and the section 404 program, which requires a permit from the Army Corps of Engineers ("Corps") for the discharge of "dredged or fill material" to the "navigable waters." Pub. L. No. 92-500, § 2, 86 Stat. 844, 880, 884, 886 (1972) (current versions at 33 U.S.C. §§ 1311, 1342, 1344, 1362(12) (2000)).

---

[5] In the late 1970's, the courts of two federal circuits held that the section 502(7) definition of "navigable waters" governs the scope of section 311, and that navigability is irrelevant. However, those cases were decided long before *SWANCC*, and it does not appear that the courts considered the full history of section 311, as discussed herein. *United States v. Texas Pipe Line Co.*, 611 F.2d 345, 347 (10th Cir. 1979); *United States v. Ashland Oil & Transp. Co.*, 504 F.2d 1317, 1324-25 (6th Cir. 1974). *See Ward v. Coleman*, 598 F.2d 1187, 1188 n.1 (10th Cir. 1979) (dictum), *rev'd*, 448 U.S. 242 (1980); *Wyoming v. Hoffman*, 437 F. Supp. 114, 115-16 (D. Wyo. 1977) (dictum).

In a new section 502(7), the 1972 Amendments defined the pivotal term "navigable waters" as "the waters of the United States, including the territorial seas." Pub. L. No. 92-500, § 2, 86 Stat. 886 (current version at 33 U.S.C. § 1362(7) (2000)). At the same time, Congress declared its policy "to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution [and] to plan the development and use . . . of land and water resources . . . ." Pub. L. No. 92-500, § 2, 86 Stat. 816 (1972) (current version at 33 U.S.C. § 1251(b) (2000)).

A. The language of the definition of "navigable waters"

Exactly why Congress chose to define "navigable waters" as "the waters of the United States" is not clear from the face of the statute. However, given Congress' stated policy of preserving state primacy over state water resources, it may well be that Congress wanted to distinguish federal waters (covered under the Act) from other waters (to be regulated by the states). After all, the term "navigable waters" has been described as "defin[ing] a federal servitude, derived from the commerce clause, that overlays what might otherwise be considered state waters," *Northern Cal. River Watch v. City of Healdsburg*, 2004 U.S. Dist. LEXIS 1008, *18 (N.D. Cal. Jan. 23, 2004).

In any event, both the phrase "navigable waters" and the phrase "waters of the United States" had an established meaning in federal law, *i.e.*, traditional navigable waters. Congress had previously used the terms "waters of the United States" and "navigable waters of the United States" interchangeably in section 10 of the Rivers and Harbors Act, 33 U.S.C. § 403 (2000). Section 10 has been held to apply only to traditional navigable waters. *United States v. Stoeco*

Homes, Inc., 498 F.2d 597, 608-10 (3d Cir. 1974). Moreover, as long ago as 1871, the District Court in *The Daniel Ball* case had used the phrase "waters of the United States" to mean traditional navigable waters:

> I regard it to be well settled doctrine of the supreme court of the United States, that all waters within the United States which are navigable for the purpose of commerce, or in other words, waters whose navigation successfully aids commerce, are *waters of the United States*.

The Daniel Ball, 6 F. Cas. 1161, 1163 (W.D. Mich.), *rev'd on other grounds*, 77 U.S. (10 Wall.) 557 (1871) (emphasis added). *See* Black's Law Dictionary 1761 (4th ed. rev. 1968) (defining "Waters of the United States" and citing *The Daniel Ball*).

Moreover, had Congress intended in the 1972 Amendments to cover purely state waters, in addition to traditional navigable waters, it knew how to say so. In the Water Quality Act of 1965, Congress had provided for development grants to states and cities for controlling discharges of inadequately treated sewage into "any waters." Pub. L. No. 89-234, § 3, 79 Stat. 903, 905 (1965). Congress could have employed the same term in the 1972 Amendments, but instead used the narrower term "waters of the United States."

B. The legislative history of the definition

The legislative history of the 1972 Amendments confirms that Congress used the terms "navigable waters" and "waters of the United States" in their traditional sense. It also demonstrates Congress' intent that the concept of

traditional navigable waters be understood by reference to modern federal case law. *See generally* Albrecht and Nickelsburg, *Could SWANCC Be Right? A New Look At The Legislative History Of The Clean Water Act*, 32 Envtl. L. Rep. 11042, 11044-46, 11048-49 (2002).

The explanatory statements of the Senate and House floor managers both describe "navigable waters" with reference to their use as a "highway" or part of a "highway" in interstate commerce. *See* 1 1972 Legislative History at 178 (Statement of Senator Muskie), 250-251 (Statement of Congressman Dingell). Senator Muskie used language in his statement nearly identical to language he had used to describe the term "navigable waters of the United States" in section 11 two years earlier. *Compare* 1 1972 Legislative History at 178 *with* 116 Cong. Rec. 8985 (March 24, 1970).

At the same time, the two floor managers' statements and the Conference Report all expressed a desire that the term "navigable waters" be given "the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." 1 1972 Legislative History at 178, 251, 327. The legislative history compiled by the Congressional Research Service does not explain what were the "agency determinations" made for "administrative purposes" about which Congress had been concerned. However, a broader look at the legislative history shows that Congress had been frustrated with the Corps of Engineers' implementation of the Rivers and Harbors Act and with EPA's interpretation of the 1970 version of FWPCA.

Before enactment of the 1972 amendments to FWPCA, the Rivers and Harbors Act had been viewed as a potentially useful federal mechanism for controlling water pollution. However, until 1970, the Corps had not regulated

dredging or filling in aquatic areas shoreward of harbor lines, even though under the old *Daniel Ball* definition of "navigable waters of the United States," the Corps plainly had the authority to regulate such areas. The House Committee on Government Operations expressly found fault with the Corps' policy, as reflected in its report of March 1970, entitled "Our Waters And Wetlands: How The Corps of Engineers Can Help Prevent Their Destruction And Pollution." H.R. Rep. No. 917, 91st Cong., 2d Sess. 6-10 (1970).[6]

Another concern was that the Corps had not been regulating waters not presently navigable in fact, even though under cases such as *Economy Power & Light Co. v. United States*, 256 U.S. 113 (1921) and *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940), the "waters of the United States" included waters that had at one time been navigable in fact (although presently obstructed) and waters that could be navigable, with reasonable improvement. In 1972, the Conservation and Natural Resources Subcommittee of the House Committee on Government Operations held hearings "concerning the role of the Corps of Engineers in administering and protecting our Nation's wetlands and waterways," and in August the full committee issued a report, entitled "Increasing Protection For Our Waters, Wetlands, And Shorelines: The Corps Of Engineers." H.R. Rep. No. 1323, 92d Cong., 2d Sess. 1 (1972). In its report, the committee criticized the Corps for its narrow approach:

> The corps' regulations currently define navigable waters as those "which are

---

[6] In May 1970, the Corps changed course and promulgated a rule regulating activities shoreward of harbor lines. 35 Fed. Reg. 8280 (May 27, 1970) (amending 33 C.F.R. § 209.150).

> navigable in fact when they are used, or are susceptible of being used, in their ordinary condition," for conducting trade or travel "in the customary modes of trade and travel on water." (33 C.F.R. 209.260 (a).) That language is based on similar language used over 100 years ago in the Supreme Court's opinion in *The Daniel Ball* . . . .
>
> However, more recent judicial opinions have substantially expanded that limited view of navigability to include waterways which would be "susceptible of being used * * * with reasonable improvement," as well as those waterways which include sections presently obstructed by falls, rapids, sand bars, currents, floating debris, etc.

Id. at 29-30.[7]

Finally, the Corps had declined to exercise jurisdiction over intrastate lakes, even if navigable-in-fact, because such lakes did not, in the precise words of *The Daniel Ball*, "form . . . by themselves, or by uniting with other waters, a continued highway over which commerce is . . . conducted by water," 77 U.S. (10 Wall.) at 563. The Committee on Government Operations apparently believed that railroad or highway links between navigable intrastate lakes and other states should be sufficient to establish federal jurisdiction, and that modern case law supported this view:

---

[7] Congressman Dingell repeated language from this hearing report in his floor statement on the 1972 Amendments. *See* 1 1972 Legislative History at 250-51.

> Although most interstate commerce 150 years ago was accomplished on waterways, there is no requirement in the Constitution that the waterway must cross a State boundary in order to be within the interstate commerce power of the Federal Government. Rather, it is enough that the waterway serves as a link in the chain of commerce among the States as it flows in the various channels of transportation (highways, railroads, air traffic, radio and postal communication, waterways, etc.). The "gist of the Federal test" is the waterway's use "as a highway," not whether it is "part of a navigable interstate or international commercial highway." *Utah* v. *United States*, 403 U.S. 9, 11 (1971); *U.S.* v. *Underwood*, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972).

H.R. Rep. No. 1323, 92d Cong., 2d Sess. 30 (1972).

Although Congress' expressed discontent was focused on the Corps, Congress presumably also was aware that in 1971, EPA's General Counsel had issued an opinion concerning the scope of the term "navigable waters of the United States" in then section 13 of the FWPCA, which regulated sewage discharges from vessels. EPA General Counsel Opinion (Dec. 9, 1971). The opinion addressed navigable intrastate waters lacking a *water* connection to other states, which might nonetheless be linked to other states by railroads or highways (essentially the same issue on which the Committee on Government Operations had disagreed with the Corps, discussed immediately above).

The opinion said that "[s]uch waters have never been held to be within the 'navigable waters of the United States,'

and the possibility of securing such a holding is remote." *Id.* Significantly, the General Counsel recommended against asserting authority over such waters because that action would only marginally increase federal regulatory coverage, and "[t]his additional margin . . . does not appear to justify the legal and *administrative difficulties* it presents." *Id.* (emphasis added).

Thus, it is clear that the "agency determinations" made for "administrative purposes" about which Congress complained in the 1972 legislative process involved the federal agencies' failure to assert jurisdiction over traditional navigable waters as fully as justified under modern federal case law. The focus of Congress' frustration appears to have been the Corps, but Congress was likely also disappointed with EPA's position.

Thus, in defining "navigable waters" as the "waters of the United States" in the 1972 FWPCA Amendments, Congress intended only to reach traditional navigable waters, although it intended that such waters be understood to be as extensive as described in modern federal case law. In other words, Congress wanted to ensure that the agencies would exercise their full constitutional power *over navigation.*

In *SWANCC*, this Court confirmed that Congress' focus in 1972 was upon traditional navigable waters. 531 U.S. at 168 & n.3, 172. This Court also confirmed its opinion in *United States v. Riverside Bayview Homes*, 474 U.S. 121 (1985), that in the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (1977), Congress had acquiesced in the Corps of Engineers' assertion of CWA jurisdiction over wetlands abutting traditional navigable waters. 531 U.S. at 167, 170-72.

C. The regulation of the "discharge of pollutants"

Although Congress focused the federal effort upon protection of water quality in traditional navigable waters (and their abutting wetlands), and chose to have the states retain primary authority to protect water quality in waters traditionally regarded as state waters, *see SWANCC*, 531 U.S. at 166-67, Congress gave EPA and the Corps adequate tools to protect traditional navigable waters from pollution from or through upstream sources, such as non-navigable tributaries. Specifically, Congress prohibited the "discharge" of pollutants, except in compliance with a section 402 NPDES permit or a section 404 permit to discharge "dredged or fill material." 33 U.S.C. § 1311(a) (2000). *See also* 33 U.S.C. §§ 1321(a)(2), (b)(3) (2000).

The term "discharge of pollutants" is defined as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. § 1362(12) (2000). The term "point source" is defined to include "any discernible, confined and discrete conveyance, including but not limited to any pipe, *ditch, channel*, tunnel, conduit, well, discrete fissure . . . from which pollutants are or may be discharged." 33 U.S.C. § 1362(14) (2000) (emphasis added). Thus, the addition of pollutants to navigable waters through a ditch is prohibited, except in compliance with a permit. But that does not mean the ditch is a "navigable water."

Similarly, a common dictionary definition of "channel" is "the bed where a natural stream of water runs." Webster's Ninth New Collegiate Dictionary 226 (1988). Thus, a non-navigable tributary adding pollutants to a navigable water (either directly or through another non-

navigable tributary[8]) can be a "point source" and subject to regulation, but not because the non-navigable tributary is a "navigable water" or "water of the United States." Conversely, a ditch or non-navigable channel that receives pollutants but that itself cannot reasonably be expected to convey pollutants to navigable waters (either directly or through another point source) is *not* subject to regulation under the CWA. However, it can still be regulated as a state water by the applicable state. *See* S. Novick (ed.), 1 Law Of Environmental Protection § 7:9 & n.2 (2004) ("[C]ommon . . . is a provision prohibiting the 'discharge' of any 'pollutant' into the 'waters of the state' without a permit. Virtually every state has a provision of this type.").

There are many cases where it is highly probable that a discharge to a tributary (in particular a primary tributary) will result in an addition of pollutants to traditional navigable waters. But there are also many cases where a discharge to a remote "tributary" cannot reasonably be expected to reach traditional navigable waters.

This is certainly true in the oil and gas industry, where many production wells and pipeline facilities are located in arid areas near normally dry streambeds or washes that eventually lead through a lengthy series of drainages to traditional navigable waters. A spill of oil or produced water could reasonably be expected to reach the dry streambed or wash, but in many such cases could not reasonably be expected to reach traditional navigable waters. While such a spill may never reach traditional navigable waters, such a spill can be cleaned up before a precipitation event even

---

[8] *See South Fla. Water Mgt. Dist. v. Miccosukee Tribe*, 541 U.S. 95, 105 (2004) ("a point source need not be the original source of the pollutant; it need only convey the pollutant to 'navigable waters,' which are, in turn, defined as 'the waters of the United States.' ").

begins to cause any migration toward traditional navigable waters.

In such instances, the CWA would not apply. However, the states may, and generally do, regulate discharges of oil to state waters, and require that they be cleaned up promptly. *See* D. Selmi & K. Manaster, State Environmental Law § 18:1 (2003) ("Liability for oil spills has long been a prominent feature on the landscape of state environmental law"). *See generally id.* at ch. 18.

III. Where The Sixth Circuit Errs

Underlying the Sixth Circuit's opinions in the present cases is the notion that the CWA was intended to protect water quality in traditional navigable waters. That much of the Sixth Circuit's reasoning is surely correct, given this Court's conclusion in *SWANCC* that "The term 'navigable' has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made." 531 U.S. at 172.

But the Sixth Circuit errs in its understanding of how Congress went about protecting traditional navigable waters. In essence, the Sixth Circuit's theory is that because **A** (a non-navigable water or wetland) might somehow affect **B** (a traditional navigable water), therefore **A *is* B**. *See United States v. Rapanos*, 376 F.3d 629, 639 (6th Cir. 2004) ("'[a]ny contamination of the Rapanos wetlands could affect the Drain, which, in turn could affect navigable-in-fact waters.'") (citation omitted). Yet this theory enjoys no support in the statute. It is made of whole cloth, presumably in an effort to accomplish the perceived ends of the statute.

This Court has often cautioned against reliance upon the general ends of a statute to enlarge or otherwise alter its intended reach. This Court has explained that

> Application of "broad purposes" of legislation at the expense of specific provisions ignores the complexity of the problems Congress is called upon to address and the dynamics of legislative action. Congress may be unanimous in its intent to stamp out some vague social or economic evil; however, because its Members may differ sharply on the means for effectuating that intent, the final language of the legislation may reflect hard-fought compromises.

Board of Governors of the Fed. Reserve Sys. v. Dimension Fin. Corp., 474 U.S. 361, 373-74 (1986). *See also Rodriguez v. United States*, 480 U.S. 522, 526 (1987) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.") (emphasis in the original).

In fact, CWA jurisprudence in most of the lower federal courts appears to have been largely purpose-driven both before and after this Court's decision in *SWANCC*. Before *SWANCC*, the prevailing theory was that to protect water quality as broadly as possible, Congress had directed EPA and the Corps to regulate any waters that might be regulated under the federal power to regulate interstate commerce. *See United States v. Earth Sciences, Inc.*, 599 F.2d 368, 375 (10th Cir. 1979) ("Every court to discuss the issue has used a commerce power approach . . . ."). Following *SWANCC*'s rejection of this "full extent of the commerce power" theory, many of the federal circuits

(including the Sixth Circuit here) have shifted to a new purpose-driven theory, *i.e.*, since Congress wanted to protect traditional navigable waters, any aquatic area with any hydrological connection with traditional navigable waters must itself be *deemed* a traditional navigable water, and subject to federal protection. *See United States v. Gerke Excavating Inc.*, 412 F.3d 804, 807 (7th Cir. 2005), *petition for cert. filed*, 74 U.S.L.W. 3309 (U.S. Nov. 11, 2005) (No. 05-623); *Rapanos*, 376 F.3d at 639; *United States v. Deaton*, 332 F.3d 698, 711-12 (4th Cir. 2003), *cert. denied*, 124 S. Ct. 1874 (2004).

Yet Congress' very specific regulatory scheme in the CWA must be given effect, even though some may believe that scheme does not go far enough to serve the ends of the statute or represent the perfect balance of policy choices. In the CWA, Congress asserted authority over traditional navigable waters (and their abutting wetlands), including the authority to protect such waters from upstream pollution. But Congress chose to protect traditional navigable waters by regulating additions of pollutants to such waters (whether directly or through ditches, channels, or other "point sources") -- *not* by rendering subject to federal regulation all activities affecting non-navigable, state waters. Congress relied upon the states to regulate activities affecting only state waters.

Here, if the Corps can show Mr. Rapanos' wetland-filling activities result in an addition of pollutants to traditional navigable waters, then those activities may be regulated. But this is quite different from the Corps' current approach, approved by the Sixth Circuit, under which the mere potential for drainage from a distant wetland to a traditional navigable water renders the wetland itself a "navigable water."

Similarly, if the Corps can show that filling of the Carabells' property results in an addition of pollutants to traditional navigable waters, then that activity may be regulated. But mere proximity to a traditional navigable water, in the absence of any hydrological connection, cannot render a wetland a "navigable water." In fact, in the *Carabell* case, the only proximity is to a non-navigable "tributary" of a traditional navigable water. Thus, the wetlands on the Carabells' property cannot even be said to be "inseparably bound up" (*SWANCC*, 531 U.S. at 167) with traditional navigable waters.

IV. Implications Of The Sixth Circuit's Holdings

If, as the Sixth Circuit holds, any hydrological connection with a traditional navigable water renders an area a "navigable water," then even normally dry hillsides would be "navigable waters," assuming there is at least occasional precipitation. One could start tracing paths of drainage at the highest point in the Rocky Mountains and follow them to the sea – and every land mass drained along the way would be "navigable waters." Thus, the potential area of the nation covered as "navigable waters" could be far greater even than the 100 million acres of wetlands (an area itself the size of California) that petitioners Rapanos, *et al.* referred to in their reply brief on the petition for certiorari, *see* Reply Br. of Petitioners Rapanos, *et al.* (On Petition) at 10.

As a result, remote oil and gas production and pipeline facilities could be required to prepare and implement SPCC plans under section 311, even where they have no reasonable likelihood of ever affecting traditional navigable waters. Also, such facilities currently are subject to fines for spills to remote, dry stream beds and washes, even if the spills are promptly cleaned up and never get

anywhere near navigable waters. *See* 33 U.S.C. §§ 1321(b)(6), (b)(7) (2000).

Moreover, under the mere proximity test of the *Carabell* case, man-made retention ponds at industrial facilities, such as petroleum refineries, pipeline facilities, or natural gas plants (located close to, but with no surface hydrological connection to, traditional navigable waters), could be "navigable waters." This would make no sense, as such ponds are specifically designed to prevent or limit the addition of pollutants to traditional navigable waters. Their mere operation in catching and holding pollutants could now be subject to NPDES permitting.[9]

Even assuming, *arguendo*, that a "significant nexus" with traditional navigable waters is enough to render any non-navigable water or wetland "navigable waters," *see Rapanos*, 376 F.3d at 639, the Sixth Circuit's theories make a mockery of this Court's concept. *Cf. SWANCC*, 531 U.S. at 167 ("It was the significant nexus between the wetlands and 'navigable waters' that informed our reading of the CWA in *Riverside Bayview Homes*."). If, as under *Rapanos*, *any* hydrological connection constitutes a "significant nexus," then very little land area would not have a "significant nexus" with traditional navigable waters. *Carabell* makes the mockery complete, holding that merely being *close* to an area that has *any* hydrological connection with traditional navigable water establishes a "significant nexus" with traditional navigable waters.

---

[9] In some cases, water from the retention basins is pumped to the facility's waste water treatment plant and discharged to navigable waters. That discharge is subject to NPDES permitting. But that is quite different from regulating the retention basins themselves as "navigable waters."

CONCLUSION

The judgments in cases 04-1034 and 04-1384 are based on a faulty construction of the CWA and should be reversed.

Respectfully submitted,

December 2, 2005

THOMAS SAYRE LLEWELLYN
(COUNSEL OF RECORD)
5125 MacArthur Blvd., NW
Suite 32-A
Washington, DC 20016
(202) 237-7291

HARRY M. NG
RALPH J. COLLELI JR.
ERIK G. MILITO
American Petroleum Institute
1220 L Street, NW
Washington, DC 20005
(202) 682-8000